(2)

NO. 89-1518

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

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KENNETH G.M. MATHER, AS TRUSTEE OF THE ESTATE IN BANKRUPTCY OF M. FRANK WATSON AND BETTY L. WATSON, AND BRIAN HARJO WATSON,

Petitioners,

v.

BILL WEAVER, ET AL.,

Respondents.

* * * * * * * * *

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

* * * * * * * * * *

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KENNETH G.M. MATHER, AS TRUSTEE OF THE ESTATE IN BANKRUPTCY OF M. FRANK WATSON AND BETTY L. WATSON, AND BRIAN HARJO WATSON,

Petitioners,

v.

BILL WEAVER; TOM NEWTON; ANDREW S. HARTMAN; ANDREW S. HARTMAN, P.C., an Oklahoma Corporation; BARKLEY, RODOLPH, WHITE & HARTMAN, a law firm composed of Michael Barkley, Charles Michael Barkley, P.C., an Oklahoma Corporation; Stephen J. Rodolph, Jay B. White, Andrew S. Hartman, Andrew S. Hartman, P.C., an Oklahoma Corporation; Sandra Rodolph and Denise G. Hartman; S & T GAS TRANSMISSION COMPANY, INC., an Oklahoma Corporation; JOHN DOE; JANE DOE and BOARD OF COMMISSIONERS OF OKMULGEE COUNTY, OKLAHOMA,

Respondents.

* * * * * * * * * * * * *

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents Bill Weaver, Tom Newton, and Board of Commissioners of Okmulgee County, Oklahoma, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Tenth Circuit's opinion in this case.

OPINIONS BELOW

Respondents do not disagree with petitioners' statements of the district court's and court of appeals' opinions set out in the petition. (Pet. 1a-17a). However, petitioners have failed to inform the court of subsequent judgments in this matter which occurred after the Tenth Circuit rendered its opinion which reversed and remanded this case to the trial court.

Petitioners did not file an application to stay the district court proceedings after this case was remanded from the Tenth Circuit in November, 1989.

Petitioners also did not inform the district court that they had sought an extension of time in which to file their petition for writ of certiorari. Thus, the district court proceeded to hear matters involving certain of the respondents.

In addition to those opinions rendered at the trial and appellate levels attached to the petition for certiorari, the United States District Court for the Eastern District of Oklahoma on March 15, 1990, granted summary judgment for respondents Bill Weaver and Tom Newton. (App. 1a-5a). The district court granted judgment for Weaver and Newton after petitioners failed to respond to the motion for more than two months. The district court further examined the pleadings and evidentiary materials and granted judgment on the merits for Newton

and Weaver based on theories of judicial immunity.

JURISDICTION

Petitioners seek to review a decision of the Tenth Circuit which reversed and remanded the district court decision as to Newton, Weaver, and Hartman. (Pet. 3a, 14a, 16a). As to these respondents, petitioners prevailed in the Tenth Circuit and were not aggrieved by the court's ruling. Any reversible error as to Weaver and Newton is moot in that the Tenth Circuit granted petitioners the relief they requested in that court. This Court's jurisdiction does not extend to moot questions except in extraordinary circumstances. See, DeFunis v. Odegaard, 416 U.S. 312 (1974).

Furthermore, as noted above, on remand the district court granted summary judgment for Weaver and Newton. (App. 1a-5a)

Petitioners have not filed a motion for new trial or any other appropriate pleading to challenge the district court's March, 1990 ruling. It is clear that events subsequent to the ruling of the court of appeals may deprive this Court of the need to exercise jurisdiction. See, e.g., Mahler v. Doe, 432 U.S. 526 (1977).

STATEMENT OF THE CASE

Whether inadvertent or intentional, petitioners have neglected to include a number of significant facts in their statement of the case. Petitioners have further mischaracterized many of the proceedings below. An accurate statement of the facts and proceedings below is vital to the Court's understanding of the specific actions taken on the part of the respondents. Petitioners have a duty to this Court to present "clear, definite,

and complete disclosures concerning the controversy when applying for certiorari." Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508, 509 (1924). In the instant case, petitioners have failed to make such a disclosure.

Petitioners paint themselves as blameless citizens deprived of their statutorily exempt personal property by actions of law enforcement officers, attorneys, and elected officials. Such a characterization is unsupported by the record.

Petitioners begin by noting that in a breach of contract action in Oklahoma state court, attorney Hartman obtained a judgment of more than $100,000 against petitioners and on behalf of his client, S&T Gas Transmission. (Pet. 4). Petitioners fail to inform the Court that

although they appealed this judgment to the Oklahoma Supreme Court, they neglected to post a supersedeas bond or any other statutory security.

In the State of Oklahoma, the posting of a supersedeas bond or other proper security is an absolute necessity to stay the execution or effect of a judgment while the appeal is pending. Okla. Stat. tit. 12 §968 (1981). Thus, respondents did not "rush to satisfy the six-figure judgment," (Pet. 3), but merely pursued their rights under Oklahoma law. See, e.g., Reuck v. Green, 103 Okla. 288, 229 P. 1070 (1924). Without the posting of proper security in the Oklahoma courts by petitioners, Hartman and S&T Gas Transmission were well within their rights in seeking to execute on the judgment.

Pursuant to its judgment, S&T Gas Transmission, through attorney Hartman, then attempted to collect the judgment. S&T Gas Transmission began a garnishment action, pursued asset hearings, and other collection procedures. (Hartman depo. pp. 28-30). Hartman also procured the writ in aid of execution which forms the basis of this lawsuit. (App. 6a-7a). Petitioners place great emphasis on the fact that the asset hearing had not been completed before the writ was issued. Petitioners fail to inform the Court that the asset hearing was "continued" under extraordinary circumstances. When the Watsons were served with a writ of execution at the hearing on assets, Mrs. Watson left the courtroom without the judge's permission and hid in her attorney's office behind locked doors. Attorney Hartman and the deputy sheriff

then proceeded to the attorney's office where Mrs. Watson refused to come out, even after being instructed to do so by the deputy sheriff. Hartman and Mrs. Watson's attorney had an altercation at the attorney's office which included the attorney's closing the office door on Hartman's foot. (Hartman depo. pp. 44-47.)

Exasperated by the Watsons' repeated attempts to frustrate his collection efforts, Hartman finally sought a writ in aid of execution from Oklahoma District Judge John David Maley, the same judge who had heard the underlying breach of contract action. Once again, Petitioners place great emphasis on the fact that Judge Maley was not the same judge who was involved in the asset hearing. This fact is wholly irrelevant in that both Judge Maley and Judge Donald Thompson,

sitting in the same judicial district, had authority to enter orders in this particular matter. Oklahoma does not have county judges or county courts. Okla. Const. Art. 7 §7. (App. 9a). Although these judges were sitting in different counties, their jurisdiction extended throughout the district. Okla. Stat. tit. 20 §120 (1981).

Judge Maley was well aware of the facts of the case, as well as the conduct of the parties, including the fact that petitioners had consistently attempted to frustrate service of summons and other legal process. (Maley depo. p. 15). Judge Maley signed the writ after examining its contents and being fully satisfied that it conformed to law and was in all ways proper. (Maley depo. p. 16). As a district judge for some twenty-two years, Judge Maley was clearly

familiar with proceedings involving execution of judgments. Furthermore, the writ included, as an attachment, a list of specific property which was subject to execution. (App. 8a). An examination of this list shows that none of this property is exempt from execution pursuant to Okla. Stat. tit. 31 §1 (Supp. 1989). (App. 11a-13a).

Armed with this properly executed writ, issued by an Oklahoma District Judge, Hartman sought assistance from the sheriff's office. Service of writs and other legal process is a statutory responsibility of county sheriffs. Okla. Stat. tit. 19 §523 (1981). (App. 10a). In fact, a sheriff may be fined for a failure to "make due return of any writ or process delivered to him to be executed." Id.

Accompanied by Deputy Sheriff Tom Newton, Hartman proceeded to the Watsons' home. Petitioners correctly state that Deputy Newton sought advice from Sheriff Weaver on how to proceed when he found the home locked. Sheriff Weaver then contacted District Attorney Thomas C. Giulioli, who advised him to proceed according to the terms of the writ. Petitioners fail to include the significant fact that Judge Maley was also contacted prior to the forced entry. (Maley depo. p. 9). Upon instructions from the sheriff, the district attorney, and the district judge; Deputy Newton carefully removed a door on the Watsons' home.

It must be noted at this point that the Board of Commissioners of Okmulgee County was never involved either directly or indirectly in any of these

proceedings. The County Commissioners were not consulted either as a group or individually. The County Commissioners had set no policy concerning execution of judgments and indeed had no jurisdiction to do so. Furthermore, The County Commissioners exercised no control or authority over either the district attorney or the sheriff.

In Oklahoma, county commissioners are public officials elected from districts within their respective counties to govern certain matters within the county. Okla. Stat. tit. 19 §321 (1981 and Supp. 1989). County sheriffs are also elected officials and serve the citizens of their respective counties. Okla. Stat. tit. 19 §131 (1981 and Supp. 1989). County sheriffs are not subject to the direction or control of the Board of County Commissioners. Okla. Stat. tit. 19 §339

(1981 and Supp. 1989). With the exception of certain auditing of the sheriff's operating budget, these elected officials operate independent of one another.

District attorneys, however, do not represent particular counties, but are elected from Oklahoma's judicial districts. In fact, there are only twenty-six "judicial districts" in Oklahoma and seventy-seven counties. Okla. Stat. tit. 20 §§92.1 through 92.27 (1981). (App. 10a). The office of district attorney is filled "in the same manner" as the office of district judge. Okla. Stat. tit. 19 §215.1 (1981). Although district attorneys may give legal advice and assistance to both law enforcement officers and county commissioners, a district attorney does not make policy decisions for any other

elected officials, and, in fact, has no jurisdiction to do so. District judges are elected from the same judicial districts as district attorneys. Judge Maley and Judge Thompson were both district judges in Judicial District No. 24, which consists of Okfuskee, Okmulgee, and Creek Counties. Okla. Stat. tit. 20 §92.25 (1981). (App. 11a).

Petitioners wholly ignore these important jurisdictional distinctions in their argument. Petitioners further seek to blur the fact that the district judge who issued the writ had jurisdiction and power over all the parties below. None of the respondents could have circumvented the court's ruling. Deputy Newton was merely following the orders of the sheriff, district attorney, and district judge in carrying out his statutory duty.

Contrary to Petitioners' claims, the property was not "indiscriminately seized," (Pet. 10-11), but instead was carefully collected as it conformed to the list attached to the writ. With the exception of one check for $6.67, all the property seized fell outside the exemptions of Okla. Stat. tit. 31 §1 (Supp. 1989). (App. 11a-13a). The property was carefully inventoried as it was removed and the dwelling was then secured. The seized property was placed in storage and later returned to the Watsons.

REASONS WHY THE PETITION SHOULD BE DENIED

The decision below was in accordance with established case law of this Court concerning causes of action for deprivation of property in alleged violation of due process. The Tenth Circuit's ruling is not in conflict with recent

pronouncements in Zinermon v. Burch, ___ U.S. ___, 110 S.Ct. 975 (1990), and Jett v. Dallas Independent School District, ___ U.S. ___, 109 S.Ct. 2702 (1989). Furthermore, the Tenth Circuit's ruling is in harmony with Pembaur v. City of Cincinnati, 475 U.S. 469 (1986), Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), and Parratt v. Taylor, 451 U.S. 527 (1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327 (1986).

Finally, petitioners failed to present many of the issues below which they now assert on appeal. Additionally, as to certain respondents, these issues are now moot. There is simply no question of law that justifies the granting of a writ of certiorari. Because of the unusual facts and circumstances involved here, this case revolves around questions unlikely

to recur in other cases. Lastly, this case would require resolutions of questions of fact decided adversely to petitioners in both the trial court and appellate court.

I.

NEITHER THE DECISION BELOW, NOR THE RECORD, RAISES THOSE QUESTIONS PRESENTED IN THE PETITION

Through inflated rhetoric, petitioners have attempted to raise this case to a much higher level of importance than its facts warrant. In all due respect to this Court, respondents assert that the only "question presented" for this Court is whether a board of county commissioners, sheriff, and deputy sheriff may be held liable for carrying out a facially valid writ signed by a district judge. The answer, of course, under any authority presented, is a resounding "no."

A. THIS COURT SHOULD NOT DECIDE QUESTIONS NEITHER RAISED NOR RESOLVED IN THE LOWER COURT

The sole question presented for review to the Tenth Circuit was whether a genuine issue of fact remained for the jury concerning petitioners' claims that they were denied due process and equal protection when Newton and Hartman entered their home and removed property. Petitioners' appeal to the Tenth Circuit was based entirely on violations of their Fourth Amendment rights. Petitioners' brief to the Tenth Circuit contained less than four pages of argument and authorities. Petitioners relied almost entirely on this Court's rulings in Parratt v. Taylor, 451 U.S. 527 (1981), and Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

Petitioners never raised issues in either the district court or the court of

appeals concerning the exempt status of the property which was seized. Furthermore, Petitioners have never attacked the statutory procedures set out in Oklahoma law which provide for execution of judgments. This allegedly "established state procedure" was for the first time questioned in Petitioners' brief before this Court. (Pet. 12).

The "normal policy" of this Court is to refuse to consider issues "which have not been presented to the Court of Appeals." Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 330 (1967), reh'g denied, 386 U.S. 1027 (1967). When issues are not properly and timely presented below, such issues are "not properly presented for review." Id. This standard is particularly applicable in review of an order granting summary judgment. The specific requirements of

Fed. R. Civ. P. 56, mandated that petitioners present their evidentiary materials and legal argument in the courts below. Petitioners cannot for the first time present issues of fact to this Court. See, e.g., United States v. Village of Aslip, 345 F.2d 365, 370 (7th Cir. 1965), cert. denied, 382 U.S. 906 (1965).

In opposition to the motion for summary judgment, petitioners failed to present evidentiary material or argument concerning the procedure for execution of judgments in Oklahoma. Petitioners raised neither argument nor evidence concerning alleged exempt property. Petitioners further failed to establish any connection whatsoever between the County Commissioners and the alleged deprivation of their Fourth Amendment rights. These issues were not properly

preserved and may not be raised now. Youakim v. Miller, 425 U.S. 231, 233-34 (1976) (per curiam).

This Court "has often refused to decide constitutional questions on an inadequate record." Ellis v. Dixon, 349 U.S. 458, 464 (1955). The Ellis Court explained the rationale behind such a refusal in noting, "if we could not ourselves decide on this record the constitutional issues tendered, we consider that by the same token the [Court of Appeals] was entirely justified in refusing to pass on them." Id.

B. THIS COURT SHOULD DECLINE TO REVIEW FACTUAL DETERMINATIONS DECIDED BELOW

Petitioners assert that "[t]he court of appeals did not explain the basis for its ruling that Okmulgee County and the law firm could not be sued for violation of the Fourth Amendment." (Pet. 8). An

examination of the Tenth Circuit's opinion shows that the court based its ruling "upon our review of the record on appeal and the parties' briefs," (Pet. 3a), concluding "that under no theory should plaintiffs' case proceed against [the County Commissioners]." Id.

The record below shows that the only theory presented to the trial court to establish liability for the County Commissioners was based on its "supervisory liability" of Deputy Newton. The trial court found that as a matter of fact and law, the County Commissioners were not responsible for actions of law enforcement officers. (Pet. 7a). Under the clear holding of Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), the County Commissioners cannot be liable under §1983 on respondeat superior theories. Accord,

Jett v. Dallas Independent School District, ___ U.S. ___, 109 S.Ct. 2702 (1989).

The trial court further found no "affirmative link," between the County Commissioners and the actions set out in the complaint. (Pet. 7a.). Although petitioners attempted to establish that Deputy Newton was acting according to policy, they failed to show either the existence of such a policy, the effect of such a policy, or a violation of such policy. (Pet. 7a). Indeed, petitioners failed to present such evidence because none exists. The district court correctly found that the conduct was "random and unauthorized," (Pet. 10a) a factual determination accepted by the Tenth Circuit. As stated in Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980), this Court will decline to review findings of fact

in which the district court and court of appeals concur.

Both courts below correctly concluded there was no evidence of an established policy. Both courts further concluded that the facts showed a random and unauthorized act. This finding is supported by the record and does not warrant further review.

II.

PETITIONERS HAVE PRESENTED NO REASON FOR THE COURT TO GRANT CERTIORARI

Petitioners attempt to argue that the Tenth Circuit's ruling is in conflict with other courts concerning the import of Parratt v. Taylor, 451 U.S. 527 (1981). The court's ruling is in harmony with Parratt. Furthermore, even if the ruling were contrary to Parratt, the Tenth Circuit reversed and remanded that part of the district court's decision

which relied on Parratt. Thus, any error will be corrected on remand.

A. THE TENTH CIRCUIT CORRECTLY APPLIED THE LAW

Concerning petitioners' Fifth Amendment claims of deprivation of property, these claims were not properly presented in their brief to the Tenth Circuit. Furthermore, the Tenth Circuit correctly ruled that such claims were governed by the Court's ruling in Parratt v. Taylor. Parratt was a §1983 action brought by a prisoner after prison employees negligently lost materials he had ordered by mail. The prisoner did not dispute that he had a post-deprivation tort remedy in state court. In Parratt, the Court ruled that the tort remedy was all the process the party deprived of property was due, because any predeprivation procedural safeguards that

the State did provide, or could have provided, would not address the risk of this kind of deprivation. The Court explained:

> The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place.

451 U.S. at 541. The proper inquiry under Parratt is "whether the state is in a position to provide for predeprivation process." Hudson v. Palmer, 468 U.S. 517, 534 (1984) (emphasis added).

In the instant case, the state of Oklahoma adequately protects the rights of judgment debtors through the posting

of a supersedeas bond, appellate procedures, hearings on assets, and garnishment statutes. As noted earlier, petitioners failed to post any appeal bond and thus their non-exempt property became subject to levy and execution. Petitioners were represented by counsel and completely ignored the statutory procedures available to them to protect their property in both the Oklahoma appellate courts and the collection proceedings.

Furthermore, attorney Hartman's actions were not the kind of acts contemplated or condoned under Oklahoma law. As the district court and Tenth Circuit concluded, these acts were "random and unauthorized." Thus, the holding of Parratt clearly applies.

Parratt's reasoning was extended to intentional deprivations of property in

Hudson v. Palmer, 468 U.S. 517 (1984). In Hudson, a prisoner alleged that a guard deliberately and maliciously destroyed his property. Once again, the prisoner had a tort remedy which could have compensated him for the loss. In Hudson, as in Parratt, the state official was not acting pursuant to established state procedures, but was pursuing a random, unauthorized vendetta against the prisoner. Id. at 521, n. 2. The Court noted: "The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." Id. at 533.

As characterized in Zinermon v. Burch, ___ U.S. at ___, 110 S.Ct. at 978, the rulings in Parratt and Hudson concerned "a deprivation of a constitutionally protected property interest caused by a

state employee's random, unauthorized conduct." Such conduct "does not give rise to a §1983 procedural due process claim, unless the State fails to provide an adequate postdeprivation remedy." Id. at ___, 110 S.Ct. at 978. Parratt's and Hudson's rationales were stated to reach those situations "where the State cannot predict and guard in advance against a deprivation, a postdeprivation tort remedy is all the process the State can be expected to provide, and is constitutionally sufficient." Id. Parratt and Hudson each represent cases "in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide." Id. at ___, 110 S.Ct. at 985.

The Tenth Circuit correctly applied Parratt to the petitioners' Fifth Amendment claims. The facts of the instant case, as those in Parratt and Hudson show a "random, unauthorized act." Petitioners have never challenged the adequacy of state tort remedies. This case clearly satisfied those criteria where a common-law tort remedy for erroneous deprivation satisfies due process. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982). Additionally, petitioners did not challenge the district court's findings concerning their Fifth Amendment claims in their brief to the Tenth Circuit.

Petitioners' brief to the Tenth Circuit set out as their only challenge the district court's application of Parratt to their Fourth Amendment search and seizure claims. Contrary to

petitioners' assertions, the Tenth Circuit did not conclude that petitioners had "an adequate state law remedy," for their Fourth Amendment claims. In fact, the part of the district court's ruling which applied Parratt to the Fourth Amendment search and seizure claims was reversed and remanded. (Pet. 3a-4a). Respondents are at a loss to understand the import of petitioners' argument to this Court in that they have been granted the relief which they sought by the very ruling of which they now complain. There is no reason for this Court to grant certiorari when any alleged error will be corrected on remand. Furthermore, the district court and Tenth Circuit have concluded that the acts complained of were both "random" and "unauthorized," based on the fact that entry into a dwelling house is not permitted under

Oklahoma law. These factual determinations are not subject to review.

B. PEMBAUR v. CITY OF CINCINNATI IS INAPPLICABLE

In Steagald v. United States, 451 U.S. 204 (1981), the Court held that an officer may not search for the subject of an arrest warrant in a third party's home without first obtaining a search warrant, unless the search is consensual or justified under exigent circumstances. The holding in Steagald was extended to constitutional violations of Fourth Amendment rights to create a basis for civil liability under §1983 in Pembaur v. City of Cincinnati, 475 U.S. 469 (1986). However, Pembaur was premised on the existence of a government policy "to take an unlawful action made by municipal policymakers." Id. at 483. The Court held:

> [T]hat municipal liability under §1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Id. at 483-84.

Petitioners have been unable to ever show any official "policy" on the part of the County Commissioners or the Sheriff which would have authorized or supported the forced entry in this case. In fact, the official "policy" was "to try not to forcibly enter anywhere." (Weaver depo. p. 19.) Apparently realizing this difficulty, petitioners tried to establish that the district attorney's advice to forcibly enter the Watsons' home established county policy. Petitioners have never presented any evidence in support of this, and their

legal argument omits fatal distinctions in Oklahoma's statutory scheme of governmental authority.

The district court correctly ruled, and the court of appeals affirmed, that the requisites for governmental liability set out in Pembaur, had not been met. Pembaur established that "[county] liability attaches only where the decision-maker possesses final authority to establish [county] policy with respect to the action ordered." Id. at 481 (footnote omitted). If the county official offered mere "legal advice," this is not grounds for liability. Id. at 484-85. Pembaur established that the policy making authority may be shown by (1) legislative enactment, or (2) delegation of authority.

Oklahoma law allows a district attorney to "give opinions or advice to

the board of county commissioners and other civil officers of his counties when requested." Okla. Stat. tit. 19 §215.5 (Supp. 1989) (App. 10a). Thus, pursuant to statute, the district attorney is clearly not a policymaker for the County Commissioners. The district attorney in Judicial District No. 24, served the citizens of three counties. As far as delegation of authority, the record is totally devoid of any evidence of delegation of authority to the district attorney by an official possessing such authority. In Oklahoma, the district attorney's authority is derived solely from statute.

Jett v. Dallas Independent School District, ___ U.S. ___, 109 S.Ct. 2702 (1989), does not change this ruling. Jett did not deal with Fourth Amendment claims. Jett further did not address the

adequacy of post deprivation remedies. Jett instead determined that the explicit remedies of §1983 were controlling in the context of damages actions brought against state actors pursuant to §1981. In so holding, Jett reaffirmed the Court's refusal to adopt a respondeat superior standard on municipalities for violations of federal civil rights by their employees. Id. at ___, 109 S.Ct. at 2721.

Jett's only application to the instant case merely restated that "'whether a particular official has "final policymaking authority" is a question of state law.'" Id. and ___, 109 S.Ct. at 2723, quoting St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988). Jett was remanded to the Court of Appeals to determine whether a government official possessed final policymaking authority in

light of the Court's rulings in Pembaur and Praprotnik. Here, those factual determinations have already occurred and both courts below have found that the district attorney did not have final policymaking authority for the County Commissioners.

As a final matter, the Court must remember that no local policy or county policy was involved in this matter. The law enforcement officers were merely executing a valid writ pursuant to state law. Local law enforcement officers are "expected to obey the law and ordinarily swear to do so when they take office." Pembaur, 475 U.S. at 486 (White, J., concurring). Both the district judge and district attorney were simply asked to interpret the language of a court order. There was simply no "policymaker" present here. "If deliberate or mistaken acts

like this, admittedly contrary to local law, expose the county to liability, it must be on the basis of respondeat superior and not because the officers' acts represent local policy." Id. Such results would not conform to Monell and Jett.

C. RECENT CASE LAW DOES NOT ALTER THE CORRECTNESS OF THE COURT'S DECISION

Petitioners attack the execution of the writ as an "established state procedure," which deprived them of due process (Pet. 12). Petitioners then attempt to apply the Court's recent pronouncement in Zinermon v. Burch, ___ U.S. ___, 110 S.Ct. 975 (1990). However, the Zinermon Court specifically stated that its opinion did not reach claims of deprivation of due process "by an established state procedure." Id. at ___, 110 S.Ct. at 979, n. 3. Zinermon

reaffirmed that such due process claims are still governed by Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). Petitioners' very characterizations of the actions in this case move them outside the ambit of Zinermon.

The Zinermon Court further found Parratt v. Taylor, uncontrolling. Id. at ___, 110 S.Ct. at 989. While Parratt dealt with random and unauthorized acts of state employees, Zinermon reached the issue of accountability of state officials for "abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue." Id. at ___, 110 S.Ct. at 989. The Court did not change Parratt's "due process analysis where post deprivation process is all that is due because no predeprivation safeguards would be of use in preventing the kind of deprivation alleged." Id. at

___, 110 S.Ct. 990. Indeed, the dissent argues that Parratt and Hudson, should govern in Zinermon. Id. at ___, 110 S.Ct. at 990 (O'Connor, J., dissenting).

In the instant case, there is simply no broad delegation of power as in Zinermon. Nor is there any showing of abuse of that power. Nothing in Zinermon changes Parratt's ruling concerning the adequacy of state law remedies for deprivation of property rights.

D. RESPONDENTS WEAVER AND NEWTON HAVE ABSOLUTE IMMUNITY IN EXECUTING COURT ORDERS

Even if the Tenth Circuit's ruling were entirely incorrect, a fact which respondents do not begin to concede, respondents have immunity in executing court orders. Respondents have raised the immunity issue from the beginning of this lawsuit. Indeed, respondents Weaver and Newton were granted summary judgment

in March, 1990 on the basis of quasi-judicial immunity. As the prevailing party, respondents "may urge any ground in support of the judgment below, whether or not that ground was relied upon or even considered by the court below." United States v. Arthur Young & Co., 465 U.S. 805, 814, n. 12 (1984).

Courts have long "provided absolute immunity from subsequent damages liability for all persons -- governmental or otherwise -- who were integral parts of the judicial process." Briscoe v. LaHue, 460 U.S. 325, 335 (1983) (quoting Butz v. Economou, 438 U.S. 478, 512 (1978)) (emphasis added). Accordingly, the Court has recognized not only the absolute civil immunity of judges for conduct within their judicial domain, Pierson v. Ray, 386 U.S. 547, 554-55 (1967)), but also the "quasi-judicial"

civil immunity of prosecutors, Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976), grand jurors, Id. at 423, n. 20, witnesses, Briscoe, 460 U.S. at 345-46, and agency officials, Butz, 438 U.S. at 512-13, for acts intertwined with the judicial process.

Deputy Newton was acting pursuant to court order and instructions from Judge Maley in executing the writ. He was thus engaged in acts intertwined with the judicial process. Absolute immunity for those officials assigned to carry out a judge's orders is necessary to insure that such officials can perform their duties without the need to hire permanent legal counsel to interpret every court order which the official must execute. See, Valdez v. City and County of Denver, 878 F.2d 1285 (10th Cir. 1989), and cases cited therein.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1990

APPENDIX

A Order of the United States District Court for the Eastern District of Oklahoma, filed March 15, 1990.

B Judgment of the United States District Court for the Eastern District of Oklahoma, filed March 15, 1990.

C Writ of the District Court In and For Creek County, State of Oklahoma

D Selected Oklahoma Statutes

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

M. FRANK WATSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 87-412-C
	)	(Filed
BILL WEAVER, et al.,	)	3-15-90)
	)	
Defendants.	)	

ORDER

Before the Court is the motion for summary judgment of defendants Bill Weaver and Tom Newton. Plaintiffs have not responded to the motion and, pursuant to Rule 14 of the Local Rules, the motion is deemed confessed. However, the Court has independently reviewed the record.

Weaver was at relevant times the Sheriff of Okmulgee County and Newton was the Deputy Sheriff. Armed with a writ of execution issued by a state court judge, movant approached plaintiffs' home and

found it locked. Newton sought guidance from the Okmulgee District Attorney, who told Newton to enter the house. The house was forcibly entered and property of the plaintiffs was taken from the dwelling. Plaintiffs bring this action under 42 U.S.C. §1983.

Movants argue that as officers sworn to execute court orders they are protected by absolute immunity while executing such orders, citing Valdez v. City and County of Denver, 878 F.2d 1285 (10th Cir. 1989). Upon review, the Court agrees and finds the motion to be well taken.

It is the Order of the Court that the motion for summary judgment of defendants Bill Weaver and Tom Newton is hereby GRANTED.

IT IS SO ORDERED this 15th day of March, 1990.

/s/ H. Dale Cook
H. DALE COOK
United State District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

M. FRANK WATSON, et. al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 87-412-C
	)	(Filed
BILL WEAVER, et al.,	)	3-15-90)
	)	
Defendants.	)	

JUDGMENT

This matter came before the Court for consideration of defendants' motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for defendants Bill Weaver and Tom Newton, and against plaintiffs.

IT IS SO ORDERED THIS 15th day of March, 1990.

/s/ H. Dale Cook
H. DALE COOK
United State District Judge

APPENDIX C

IN THE DISTRICT COURT IN AND FOR
CREEK COUNTY, STATE OF OKLAHOMA

S & T GAS TRANSMISSION,	)	
	)	
Plaintiff,	)	
	)	Case No.
vs.	)	C-83-664
	)	
M. FRANK WATSON and BETTY L. WATSON, et al.,	)	
	)	
Defendants.	)	

WRIT

STATE OF OKLAHOMA, OKMULGEE COUNTY

STATE OF OKLAHOMA TO THE SHERIFF OF OKMULGEE COUNTY:

WHEREAS, in a certain action lately tried before me, wherein S & T Gas Transmission Company was Plaintiff, and M. Frank Watson, Betty L. Watson and Watson Gathering Systems, Inc. were Defendants, judgment was entered on the 23rd day of April, 1986. Whereas counsel has advised the Court that assistance is needed to execute upon the property of the

aforesaid Defendants. Now, therefore, you are hereby commended [sic] to forcibly go upon the premises of said individuals, to enter the premises of said individuals and execute upon the personal property enumerated at Exhibit "A" to this Writ.

/s/ John Maley
JOHN MALEY
District Judge

EXHIBIT "A"

Trophys
Madallions
Paintings
Sculptures
Statutes
Cash
Coins
Furs
Jewelry
VCR
Televisions
Stereos
Radios
Christmas Presents
Clocks
Antiques
Silver
China
Crystal
Unnecessary Furnishings
Rugs
Saddles
Bridles
Cars
Computers
Typewriters
Tapes
Records
Movie Equipment and Video
Guns
Recreational Equipment

APPENDIX D

Okla. Const. Art. 7 §7.

§7. District Courts - Jurisdiction - Courts abolished - Transfer of jurisdiction, files, etc.

(a) The State shall be divided by the Legislature into judicial districts, each consisting of an entire county or of contiguous counties. There shall be one District Court for each judicial district, which shall have such number of District Judges, Associate District Judges and Special Judges as may be prescribed by statute. The District Court shall have unlimited original jurisdiction of all justiciable matters, except as otherwise provided in this Article, and such powers of review of administrative action as may be provided by statute. Existing electing districts for all who are or who become District Judges and Associate District Judges under the terms of this Article shall remain as they are constituted for the offices formerly held by such person on the effective date of this Article, until changed by statute. The Legislature may at any time delegate authority to the Supreme Court to designate by court rule the division of the State into districts and the numbers of judges.

Okla. Stat. tit. 19 §215.5 (1981)

§215.5 Advice to county officers

The District Attorney or his assistants shall give opinion and advice to the board of county commissioners and other civil officers of his counties when requested by such officers and boards, upon all matters in which any of the counties of his district are interested, or relating to the duties of such boards or officers in which the state or counties may have an interest.

Okla. Stat. tit. 19 §523 (1981)

§523 Failure to make returns - Penalty

Whenever any sheriff shall neglect to make due return of any writ or process delivered to him to be executed, or shall be guilty of any default or misconduct in relation thereto, he shall be liable to a fine or attachment, or both at the discretion of the court, subject to appeal; such fine, however, not to exceed Two Hundred Dollars; and also an action for damages to the party so aggrieved.

Okla. Stat. tit. 20 §92.1 (1981)

§92.1 Judicial districts - District Judges

The state is hereby divided into twenty-six (26) district court judicial districts with the number of authorized districts and district judges to be as

provided in Sections 2 through 27 of this act.

§92.25 District No. 24

The counties of Okfuskee, Okmulgee and Creek. Said district shall have five district judges to be nominated and elected as follows: One candidate to be nominated and elected at large and a legal resident of Okfuskee County; two candidates to be nominated and elected at large and legal residents of Okmulgee County; and two candidates to be nominated and elected at large and legal residents of Creek County, all of whom shall be elected at large.

Okla. Stat. Tit. 31 §1 (Supp. 1989)

HOMESTEAD AND EXEMPTIONS

§1. Property exempt from attachment, execution or other forced sale -- Bankruptcy proceedings

A. Except as otherwise provided in this title and notwithstanding subsection B of this section, the following property shall be reserved to every person residing in the state, exempt from attachment or execution and every other species of forced sale for the payment of debts, except as herein provided:

1. The home of such person, provided that such home is the principal residence of such person;

. . . .

3. All household and kitchen furniture held primarily for the personal, family or household use of such person or a dependent of such person;

. . . .

6. Tools, apparatus and books used in any trade or profession of such person or a dependent of such person;

7. All books, portraits and pictures that are held primarily for the personal, family or household use of such person or a dependent of such person;

8. The person's interest, not to exceed Four Thousand Dollars ($4,000) in aggregate value, in wearing apparel that is held primarily for the personal, family or household use of such person or a dependent of such person;

. . . .

12. Two horse and two bridles and two saddles, that are held primarily for the personal, family or household use of such person or a dependent of such person;

. . . .

14. One gun, that is held primarily for the personal, family or household use of such person or a dependent of such person;

. . . .

18. Seventy-five percent (75%) of all current wages or earnings for personal or professional services earned during the last ninety (90) days, except as provided in Title 12 of the Oklahoma Statutes in garnishment proceedings for collection of child support;

. . . .

B. No natural person residing in this state may exempt from the property of the estate in any bankruptcy proceeding the property specified in subsection (d) of Section 522 of the Bankruptcy Reform Act of 1978, Public Law 95-598, 11 U.S.C.A. 101 et seq., except as may otherwise be expressly permitted under this title or other statutes of this state.

C. In no event shall any property under paragraph 5 or 6 of subsection A of this section, the total value of which exceeds Five Thousand Dollars ($5,000), of any person residing in this state be deemed exempt.